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Abstract

In this paper, we argue that the legitimization of killing in war is not simply formed by adherence to certain legal requirements that exist apart from and prior to war; instead, we suggest, the law of armed conflict in itself cannot but operate through admitting certain materials onto the battlefield as distinctively legal materials. Using the theory of legal materiality, we show that the military uniform is a legal material that makes the legal matter of legitimate targeting intelligible to law. This process happens through the ways in which the uniform shapes the possibility of visual recognition and differentiation in order to make certain bodies targetable and others not targetable. We refer to this visual recognition and differentiation as a domain of persuasion. We show that the historical, functional and visual attributes of the uniform, as a design artefact, produce a convincing domain of distinction for the attacking agent. Finally, we turn to insurgency, arguing that the legal matter of targeting is shaped not only by the presence, use and manipulation of this legal material but also by the absence of it.

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Mahmoud Keshavarz and Amin Parsa

1 The Battle of Materials

In 1960 the CBS network broadcasted a 20-minute film titled 'How to Kill People: A Problem of Design'. In the film, George Nelson, a well-known American industrial designer, presents an argument concerning the historical development of weaponry design. Beginning with prehistoric stone weapons and moving on to rocket launchers and nuclear bombs, Nelson shows how the distance between the operator of these weapons and those subject to their violence has expanded greatly as weapons have become more complicated. Describing the development from a simple stone to a stone club and then to a bow and arrow, Nelson states: 'When the designer comes into the picture there's a tremendous improvement in the product. It's more interesting to look at. [The attacker] doesn't have to move quite as close. And the force of the blow is greatly increased' (1961: 47).

For Nelson, the bow and arrow is 'the greatest of all inventions for separating the attacker from his victim' (ibid). The efficiency in killing brought about by the practice of designing, which allows one to increase both destructive power and the distance between attacker and victim, reveals as a 'silly myth', Nelson says, the idea 'that generals win wars. What the facts show is that designers do' (ibid). Wars are won by the side that has more creative designers at its disposal. If one side has a

hand-held stone axe, the others only have a chance if they can design a helmet, and so on. From Nelson's perspective, war is a battle between different materials and materialities, a confrontation between artefacts and other artefacts, that is driven by the political aims of a sovereign and configured through acts of design. Wars are struggles between the stone club and the iron helmet, between the bow and arrow and the shield, between the catapult and the castle, between the missile and the city. As such, the successful weapon designer is the one who allows soldiers and generals to move so far away from the battlefield that 'we never see the white of their eyes again' (ibid.). In this way, the ideal weapon system is the one whose user is not visible on the battlefield.

What Nelson's reflections teach us is that the act of killing during war is always configured through the material organisation of the battlefield. This involves the employment of weaponry and equipment, but it also involves the use of signs, uniforms and technologies of seeing. The task of the law of armed conflict in regulating the characteristic activity of war – killing and destruction – is thus based upon the in/visibility of particular objects and materialities.

We contend that the legal requirements that legitimise killing in war are not external to the conduct of war and its technologies, materialities and practices. Instead, the law of armed conflict itself cannot operate but through the admission of certain materials as distinctively *legal* materials that are, in turn, enlisted in the production of lawful killing. We use the theory of 'legal materiality as a mode of inquiry' (Kang and Kendall, Introduction, 1) to understand the role of the specific materials involved in the production, mediation and negotiation of the law of armed conflict. Legal materiality

denotes the process or composition by which matters turn into legal concerns or problematizations through materials, such as texts, forms, formats, techniques, and physical and immaterial entities. This approach seeks to understand how different materials articulate and shape legal difference (Kang and Kendall, Introduction 4).

According to this perspective, different legal materials are assembled, or come into a relationship with one another, in a way that

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transforms a matter into a legal matter and into a claim or argument through contingent acts of mediation. We refer to these mediations as 'persuasion', a particular concept borrowed from the field of design studies which has long been concerned with the materials and materialities of the world. The reference to persuasion here is not meant to suggest that these are rhetorical tools. It is rather a way of emphasising that historical usages, functions and aesthetic norms and forms give materialised things and artefacts the capacity to convince their users to use them in certain ways and thus to shape users' actions and behaviour in the world. We believe that while materials can become the subject of law, and consequently legal materials, through an act of interpretation and/or mediation, not all materials are equally able to be discussed and analysed and to become legal materials. For this reason, we use the concept of 'persuasion' to point to the historical, functional, visual and physical capacities of an artefact that make it convincing as a legal material. It is the entanglement of law with the specific capacities of a designed object, an artefact, that qualifies that artefact and not others as a legal material. We advance this argument with reference to a specific legal material, the military uniform, and in relation to a specific legal matter: the principle of distinction and the concept of a legitimate human target in the law of armed conflict.

Our argument proceeds in four steps. First, we provide a background discussion about how the law of armed conflict establishes a domain of persuasion in which targeting may take place through its requirement that certain signs and markers be used on the battlefield. Second, we highlight the military uniform as an important device through which the principle of distinction is operationalised. Third, we discuss how the uniform establishes an expansive domain of visibility that helps to produce the legal distinction between the categories of legitimate human target and civilian. This means that the battlefield is organised in such a way as to persuade the attacker, through the use of the visual and performative markers of the military uniform, that a specific body is a targetable one. Finally, we argue that, in the context of insurgencies, the absence of the legal material of the military uniform is compensated for by a complex technological apparatus of seeing and sensing; namely,

through drone warfare. Thus, the matter of distinction becomes a legal matter, as a principle, through the complex ways in which the existence, imposition, removal or imitation of a uniform persuades an attacker that some bodies are targetable and others are not. By showing how legal materiality operates in the context of the law of armed conflict in order to make legitimate killing possible, we make clear that it is not only the presence but also the absence of certain legal materials, like uniforms, that shapes the legal matter of targeting during wartime violence.

2 Making a World of Distinction through Materials

In the context of the law of armed conflict, the principle of distinction divides the battlefield into bodies and spaces against which lethal violence may be used (combatants and military objectives) and bodies and spaces against which lethal violence may not be used (the civilian population and civilian objects).

In relation to targeting, the principle operationalises the discriminate use of violence by relying on a series of materials that create and maintain distinctive visual markers of targetability. However, targetability is not necessarily conveyed by a single sign; it is a consequence of a particular configuration of materials of certain sizes, shapes and colours, and artefacts and sites, in a particular relation to other objects and entities present in an area of battle. These visualisations present sites and bodies within which the political and military willpower of parties to an armed conflict are concentrated; these are objects whose destruction will secure a 'military advantage' for one side (*Additional Protocol I* 1977, Art. 51(5)(b)) and force the other to yield to their adversary's will (Clausewitz 2000 (1832)).

States' presence on the battlefield is thus governed by detailed regulations concerning the dimensions, colours and materials used in the production of distinctive signs, flags, emblems and paintings on vehicles and weapon systems (Pilloud et al. 1987: 1143, Cauderay 1990). Such signs must be produced so as to be 'as large as appropriate' given the circumstances: 'At night or when visibility is reduced, the sign may be lighted or illuminated' (*Annex I to Additional Protocol I* 1977, Art.

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17). Moreover, given that violence during war is constrained through such modes of visibility, national signs, uniforms and emblems must be communicated between enemies through diplomatic processes (Pilloud et al. 1987: 468). Here, an initial domain of persuasion is established through different materialities: the composition of flags, signs, emblems, logos and colouring.

Behavioural scientist B J Fogg (2002) has argued that technologies are inherently persuasive, meaning that they persuade their users to use them in certain ways as conceived by their designers. However, technologies need to be articulated and formed through useful and functionally designed products, services and systems in order to be persuasive to the intended users. The persuasiveness of technologies configured through concrete artefacts moves beyond the use and consumption of the artefacts and takes place within a larger framework. In this sense, the technological configuration of the world is not so much about the production of new and appealing products. Through their ability to generate behaviour, demand, expectation and ways of doing and being in the world, designed objects shape specific worlds in which only certain technological artefacts can make sense and be seen as useful and functional (Akrich 1992). Thus, persuasiveness is not a feature of technology but rather appears in its design (Redström 2006). Any designed thing in the world, any configuration of materials, involves a level of persuasiveness, regardless of the complexity of its technological components. Artefacts carry with them certain ideas about their uses and contexts. They not only present and represent a certain point of view; they also act as an argument, in a materialised form, in favour of adopting that particular point of view. Signs, logos, emblems, colours, flags and uniforms turn the battlefield into a visual space of seeing, sensing and recognising. With different scales and sizes, uses, effects and outcomes they generate a world within which law can operate. The world configured through all these materials makes it possible for the attacking agent to be persuaded that certain bodies and objects are civilian and certain are military, and therefore targetable.

3 Shaping Targetable Bodies through the Military Uniform

The principle of distinction, a foundational principle of the law of armed conflict, realises its matters – that is, human targets (combatants) and non-targets (civilians) – through the use of a specific artefact: the military uniform.

In conventional wars, combatants are defined as legitimate targets by virtue of their role in the organisational structure of the modern state army. This membership in an organised armed force carries with it an obligation to wear a ‘fixed distinctive sign recognisable from distance’ and to ‘carry arms openly’ (*Third Geneva Convention 1949*, Art. 4).¹ As far as the law of armed conflict is concerned, without these visual requirements there cannot be an operable distinction between targets and non-targets, beside the very act of attack itself. The requirement of visual self-identification appears explicitly in Article 44(3) of the Additional Protocol I 1977:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.

This obligation of visibility is traditionally fulfilled by the wearing of distinctive military uniforms (Henckaerts and Doswald-Beck 2005: 90). The legality of lethal targeting depends on the fulfilment of two separate obligations by parties to an armed conflict, both of which depend on the visual functions of the uniform: (i) to make a distinction between the civilian population and combatants during an attack and (ii) to present one’s own combatants as targets to the adversary in a visibly distinctive manner.

The consequence of this linkage between the use of the uniform and the production of legal categories is that killing in war while not wearing a uniform and intentionally killing individuals who are not in uniform and not directly participating in hostilities both fall outside the bounds of lawful targeting. Visual indicators like military uniforms and/or other fixed and visible signs are the legal materials that make

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the discriminate targeting of human beings concrete and operative. Even in those exceptional cases where combatants cannot make themselves visible by means of a uniform, they are required to engage in a minimum level of visibility by carrying arms openly (*Additional Protocol I* 1977, Art. 44(3)).

Understanding targeting through the materials informing the principle of distinction reveals the extent to which the military uniform is consequential for the law of armed conflict. However, this is not to say that the military uniform is the exclusive legal material for the extremely complicated practices and laws of armed conflict. While the military uniform creates a field of vision that organises killing, how this visual field is seen and what sorts of materials and technologies are involved in making sense of the entities seen within it are equally important issues. Seeing is a socially and technically complicated practice bound up with different visual cultures (Mirzoeff 2006, 2011, 2015) and specific frames of persuasion offered by different technologies of seeing, such as audio-visual sensors, radars, thermal cameras, maps, aerial photographs, etc. We do not discuss all of these materials and technologies here, not least because others have already debated the regimes of visibility in war at length (Bousquet 2018, 2009, Chamayou 2015, Wilke 2017, Gregory 2011, 2015). We focus on the military uniform because it has played a central role in the development of modes of visibility and invisibility within which many other technologies operate. As such, it has a direct link with the legal matter of the principle of distinction that other technologies lack.

First and foremost, a military uniform signifies that its wearer is subject to a kind of normativity that differs from that of civilian life (Guillaume, Andersen, and Vuori 2015: 56). It signifies that otherwise prohibited acts such as the arbitrary deprivation of life and assault are conditionally suspended. Moreover, uniformed members of an army carry out such acts with immunity from legal prosecution (Fleck 2008: 81),² so if captured they can enjoy the privileges of prisoner-of-war status (*Third Geneva Convention* 1949, Art 4). The difference made by the military uniform is best illustrated by considering the legal

consequences of the very same people committing the same violent actions but without wearing this visual signifier. If members of a state's armed forces participate in hostilities while not wearing the uniform, they may be prosecuted for war crimes (*Additional Protocol I 1977*, Art. 37). They lose immunity from prosecution and cannot become prisoners of war. When it comes to the legitimisation of violence, the difference that the presence of the military uniform makes is expansive and decisive (Cf. Kutz 2005) – indeed, it is persuasive. One example that illustrates how the meaning of the legal categories of combatant and civilian derive from the visual functions of the military uniform is the International Committee of the Red Cross's official commentary on *Additional Protocol I (1977)*, which warns civilians against wearing any piece of clothing that resembles a military uniform in a conflict zone:

A journalist risks losing effective protection [...] if he wears clothing, which too closely resembles military uniform, he will incur risks of a similar nature. In (this case) he therefore acts at his own risk: in exposing himself to danger in this way he would forfeit [civilian] protection *de facto* (Pilloud et al. 1987: 922).

Artefacts like the military uniform establish a larger interpretive framework, a world view that mediates a series of norms and values (Atzmon 2010) – here, legal ones. That is, any artefact produces a domain of persuasion. Persuasiveness is not only an inherent feature of a material's physicality but also its history. The military uniform does not simply become a legal matter; a material becomes legal through the ways in which it gets called into law on account of its specific historical, functional, material and visual capacities.

The reason that the military uniform, rather than other artefacts, became the central legal material for the law of armed conflict has to do with its various social, political and historical functions. Contemporary military uniforms are appropriations of historical practices of visual self-identification and distinctions such as the flamboyant attire of 15th century German mercenaries, *Landsknechte* (Münkler 2004: 56), and the early 17th century practice of French soldiers wearing coloured cloth tied around their waists (Craik 2003: 131). The military uniform

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as an organisational and logistical requirement of the professional army emerged with the 'statistation of war', the historical period in which modern nation states established themselves in part by creating armies of professional soldiers and ending the dependency of sovereigns upon mercenary forces (Münkler 2004: 55).

The military uniform possesses its material capabilities and attributes because it exercises disciplinary authority over the body of its wearer, a kind of authority fashion scholars refer to as 'dress practices' (Peoples 2014: 8). By externally communicating messages of chivalry, courage and patriotism, the military uniform creates what Jane Tynan (2013) calls the desirable image of wartime masculinity, and as such it acts as a means of attracting recruits. Internally and for its wearer, the military uniform is part of a disciplinary process of imposing tailored modes of action, manners and movements that are essential in order to create a professional army out of ordinary civilians (Peoples 2014: 11) or, as Foucault puts it, to 'get rid of the peasant and [give] him the air of a soldier' (Foucault 1995: 135).

Thus, only an artefact like the military uniform, with its own specific capacities and attributes, is able to establish a larger interpretative framework, a domain of persuasion within which acts of legitimate targeting may take place. Without a legal material like the military uniform, the legal matter of distinguishing legitimate targets from illegitimate ones would not be intelligible to law.³

4 Shaping Back the Legal Matter of Targeting

Once a legal material makes a matter of law concrete, it can also make possible other material practices that may persuade individuals to undertake actions or may suggest interpretations that were otherwise not possible, conceivable or permissible. Because it is a legal material connected to the permission to use or be protected against lethal force, the uniform is constantly reappropriated on the battlefield. A uniform can be taken off and replaced by civilian attire. One can also illicitly wear an enemy uniform, the uniform of a state not party to the conflict or the uniform of other protected entities, such as humanitarian NGOs, the UN or the ICRC.

The versatility of certain materials points to the historicity of their persuasive power as well as to the possibility of manipulating the world in which they operate. In February 2002, Médecins Sans Frontières reported that US special forces often operated in Kandahar wearing civilian clothing like jeans and T-shirts or Afghan civilian attire like a traditional Afghan scarf and Afghan hat (Pakol) instead of the US military uniform (Kelly and Rostrup 2002). Similarly, during a hostage rescue operation in 2008, Colombian armed forces posed as members of an imaginary humanitarian NGO, with some combatants displaying the emblem of the ICRC, in order to infiltrate a Fuerzas Armadas Revolucionarias de Colombia (FARC) military base. Consequently, the Colombian forces managed to rescue Ingrid Betancourt – a presidential candidate who was kidnapped six years earlier – and arrest the commander of the FARC military base (Brodzinsky and Davies 2008).

The possibility of using the military uniform in these deceitful ways shapes other parts of the law of armed conflict, which prohibit the perfidious use of the enemy uniform and the use of other protected signs, emblems or uniforms (*Additional Protocol I* 1977, Art. 37(1) and 38(1)).⁴

The fact that the battlefield is organised through specific logics of visibility, as specified and reflected in the law of armed conflict, reveals that the legitimate human target, as well as the very idea of the legitimate use of violence, is constituted, preserved and made persuasive by visual and material markers, with the military uniform central among them. Like any other artefact, the military uniform is not only an instrument that passively achieves certain functions that are ascribed to it. It also shapes various levels of engagement, communication and mediation (see Buchanan 1989, Fry 2010). What makes the military uniform into the primary legal material for the operation of the law of armed conflict is not the fact that its role is universally agreed upon by all parties involved in war. Rather, it serves as a legal material because of the persuasive visual capacities it has by virtue of its seemingly simple yet also detailed, regulated, mobile and versatile materiality, which generates an expansive domain of persuasion within which targetable

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and non-targetable entities can be seen and recognised.

Technologically speaking, the military uniform is unique in creating this domain of persuasion. There are two reasons for this. One concerns the self-identification and visualisation as an enemy target as opposed to a complete recognition of enmity by the adversary. The other concerns the separation of the means and processes of visual distinction from those of killing, meaning that the military uniform separates the act of killing from the act of recognising a target. The technology of killing and recognition are separated for the simple reason that the space between these two is the space of decision making, negotiation, evaluation and interpretation. This sort of negotiation happens, for instance, in cases where a uniformed soldier is waving a white flag, or where a uniformed soldier is *hors de combat*. The protected status of such soldiers is made possible by the preservation of a space between the technologies of killing and the technologies of seeing. What the artefact of the military uniform therefore does is to generate and maintain a domain of persuasion within which the principle of distinction can operate in a variety of different situations.

5 Coda: The Absence of the Uniform

Nelson's film, discussed at the outset of this article, makes it clear that the distance between the user of weapons and those subject to their violence has expanded greatly at the same time that the designs of these weapons have grown more complicated. It also shows us that targets of destruction in wars are recognized and shaped through the material developments of the designed artefacts involved in destruction.

So far, we have shown that the domain of visualisation shaped by the use of a specific material, in our case the uniform, helps to persuade the attacker to kill by clarifying the distinction between legitimate targets and illegitimate targets. This is to say that we can take the introduction of the uniform as an introduction of new sets of 'legitimised' targets that were not previously aspects of the practice of war.

Whilst the military uniform helps to persuade soldiers to carry out the legal violence of war, one contemporary form of armed conflict,

i.e. counterinsurgency, is characterised by insurgents' eschewal of the military uniform. Insurgents refuse to engage in any form of visual self-identification by refusing to wear distinctive clothing or signs.⁵ In practical terms, insurgents seek to become invisible – at least until the moment of explosion or exchange of fire. The tactical value of invisibility lies, of course, in the persuasive function of the uniform's visibility. The visibility of the uniform provides for an immediate recognition of enmity and targetability. Once the military uniform is gone, the persuasiveness that legitimises violence goes with it. As far as the law of armed conflict is concerned, '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian' (*Additional Protocol I* 1977, Art. 50(1)). The insurgent's refusal to wear a uniform while engaging in operations is a way of disrupting the domain of persuasion by creating a general condition of doubt about individual statuses. The result is that it becomes nearly impossible for the asymmetrically stronger counterinsurgents to use lethal force discriminately, and therefore legally. The legal matter at stake - that is, discriminate targeting in accordance with the principle of distinction - is rendered impossible in the absence of its material, the military uniform. This in turn suggests a need for other materials to serve this function. The rise of drone technology can be seen in part as a way of remaking the domain of persuasion that was once generated and sustained by the extensive use of military uniforms as means of operationalising the law of armed conflict.

Therefore, the legal matter of wartime violence is shaped not only by the presence but also by the absence of legal materials like uniforms. While the complex visual and technical apparatuses of drone warfare have obviously changed the scale of visual production, this new type of warfare plugs into an already legitimised practice: 'whoever wears the uniform is a targetable body' now becomes 'whoever appears on the screen as the result of data and pattern-of-life analysis is a targetable body.' Other scholars have focused on the transformative effects of drones, whether moral (Alston 2010), geographical (Grayson and Mawdsley 2018, Maurer 2017), legal (Mégret 2012, Wilcox 2016) or political (Holmqvist 2013). We wish to push this line of argument

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further by suggesting that drone warfare depends on a variety of materials that inform the practice of targeting. If one takes this claim seriously, then it becomes clear that the most important fact about drone warfare is that it is able to plug into the material trajectory of legitimate wartime violence and its legal categories. It can be argued that the production of the categories of combatant and civilian is a function of a regime of sensibility and of the interpretation of the visual field that materials such as drones, uniforms, and signs create (Wilke 2017). However, such sensemaking and interpretation would not have been possible in the first place if it were not for the capacity of certain materials to contribute to the production of legitimate violence.

In 2001 the first US drone attack occurred in Afghanistan. A Predator drone filmed a tall, bearded man in a turban, towards whom three other men appeared to be acting reverently, and this footage appeared on some CIA drone operator's monitor. The four observed men were in a former mujahideen camp in Zhawar Kili. Taken together, the location, appearances and behaviour of the men convinced the decision makers that the tall man in the turban was none other than Osama bin Laden (Sifton 2012). Soon after, it became clear to the Pentagon that this had not been the case. Pentagon Spokeswoman Victoria Clarke (2002) later conceded that the 'tall man' was not bin Laden, yet she added: 'we are convinced that it was an appropriate target', even though 'we do not know yet exactly who it was.' It was later revealed that the individuals were villagers gathering scrap metal (Mayer 2009).

Targetable bodies have always been produced through the visualities afforded by materials, and the act of targeting these bodies is legitimised because these visualities manage to maintain an already established domain of persuasion: once you are configured by the legal materials of targeting, you are seen as a target.

Endnotes

1. The other two criteria for the combatant category are the existence of a hierarchical command structure and adherence to the laws and customs of war.

2. Of course, they enjoy this immunity only as long as such acts are carried out in accordance with the principles of the law of armed conflict, such as distinction and proportionality.
3. We borrow this analysis from Kang and Kendall (Introduction), who argue that, ‘without legal materials, legal matters are not intelligible to law.’
4. It must be noted that not all manipulations of the visual regime of targeting are prohibited. Some are in fact permitted and are widely practised. A case in point is camouflaged uniform, which effectively serves to trick the onlooker into not seeing the uniformed combatant and yet is a permitted ruse of war (Additional Protocol I 1977, Art. 37(3)).
5. Note that depending on their objectives, the context and the stage of their development, different insurgent groups may behave in various ways. For instance, insurgent groups with self-determination as their objective or with aspirations of statehood often imitate the behaviours of organised state armies, such as wearing matching badges or uniforms. The point here is that the defining characteristic and general tendency of insurgent groups, as the asymmetrically weaker parties to armed conflicts, is nevertheless to avoid wearing visible signs and uniforms.

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